



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 218 OF 2014**

IBSOLE INVESTMENTS LIMITED ..... PLAINTIFF/APPLICANT

-versus-

MKUKI RANCH LIMITED.....1<sup>ST</sup> DEFENDANT/RESP

SARAH WAKESHO MWANG'OMBE..... 2<sup>ND</sup> DEFENDANT/RESP

SISTY WANA MWAMBURI ..... 3<sup>RD</sup> DEFENDANT/RESP

ONESMUS MWABULE MWAKIO..... 4<sup>TH</sup> DEFENDANT/RESP

**RULING**

1. The court is considering the Notice of Motion dated 18th August 2014 for the following orders:

- i. Spent
- ii. Spent
- iii. Spent
- iv. Spent
- v. That an injunction be granted restraining the Defendants, their servants, agents, employees or any other person claiming through them from interfering with the Plaintiff's possession, occupation and use of the property known as L.R. No. 12922 situate within Taita Taveta pending the hearing and determination of the suit.
- vi. That an injunction be granted restraining the Defendants, their servants, agents, employees or anybody claiming through them or acting on their behalf from leasing, selling or alienating to third parties or in any other manner howsoever interfering with the property known as L.R. No. 12922 situate within Taita Taveta County pending the hearing and determination of this suit.
- vii. The costs of the Application be provided for.

2. The Application is supported by the Affidavit of IBRAHIM SOMOW AHMED sworn on 8th March 2014. The gist of the Applicants' case is that it is the bonafide and lawful owner of L.R. No. 12922 ("the suit property") having purchased the same from the 1st Defendant in or about August 1996. That the Plaintiff paid Kshs. 3,500,000/= on signing of the Sale Agreement on condition that the Vendor and its shareholders were to put the Plaintiff in possession of the suit property pending completion of the sale and transfer of the suit property to the Plaintiff.

3. The Plaintiff states that it has been in possession of the suit property as a purchaser in possession since 1996 and has over 2000 heads of cattle on the land and did construct a dam thereon in 1997 at a cost of Kshs. 1,500,000/= with the full consent of the Vendor. The Plaintiff avers that it has been ready to complete the purchase of the suit property but the Vendor and its shareholders have

- not been able or ready to complete the sale and allowed third parties to move into and occupy parts of the suit property to conduct mining and other activities thereon.
4. The Plaintiff states that the 2nd to 4th Defendants have unlawfully demanded that the Plaintiff and its directors do vacate the suit property and are threatening to illegally evict the Plaintiff and its directors from the suit property. The Plaintiff states that it is apprehensive that the Defendants will move into or attempt to forcibly evict it from the suit property unless restrained by the Court.
  5. The application was opposed by the 1st Defendant through the Replying Affidavit of its director, NEWMAN MWANGOMBE sworn and filed on 2nd October 2014. The 1st Defendant avers that the Plaintiff is guilty of material non-disclosure since it has failed to disclose that there exists a civil suit No. 2190 of 2014 in the Chief Magistrates Court between MKUKI RANCH LIMITED and IBRAHIM SOMOW where Mkuki Ranch has sought an injunction to restrain Ibrahim Somow from entering in the suit property as well as vacant possession and surrender of the title document in respect of the suit property.
  6. The 1st Defendant states that there is not and has never been any sale whatsoever of the suit property. That the Plaintiff's authorised officer, Ibrahim Somow Ahmed came into possession of the original title for the suit property purely for the purposes of obtaining a Visa from the French Embassy and all calls to return the title fell on deaf ears. According to the 1st Defendant, the Plaintiff was made aware that the cost of grazing cattle was Kshs. 35/= per animal per month. The 1st Defendant states that the Plaintiff has not established a *prima facie* case with a probability of success and has not proved that it will suffer irreparable loss or harm that cannot be compensated by an award of damages.
  7. The 2nd Defendant opposed the Plaintiff's application through her Replying Affidavit sworn and filed on 2nd October 2014 in which she deposes that the suit property was not sold to the Plaintiff's and that the same forms part of the Estate of Oliver Mkungusi. The 2nd Defendant also states that the late Oliver gave Ibrahim Somow Ahmed the title deed to the suit property for purposes of acquiring visa.
  8. The 2nd Defendant averred that the suit property was not sold to the Plaintiff but rather the Plaintiff was a tenant thereon who was paying rent and thus the Plaintiff is guilty of material non-disclosure and is not deserving of the orders sought. In the Plaintiff's Supplementary Affidavit filed on 3rd November 2014, IBRAHIM SOMOW AHMED deposes that Cromwel Mkungusi gave him the original title on the understanding that the Plaintiff company of which he was the majority shareholder had already made the substantial payment towards the purchase of the property and the deponent needed to use the title as evidence that his company had acquired the property to prove some of the properties he owned for visa purposes.
  9. The Plaintiff averred that it is not a tenant on the suit land but is occupying the same as a purchaser in possession pending completion of the sale and has been paying land rates. The Plaintiff further averred that it had raised a preliminary objection and sought the striking out of Nairobi CMCC No. 2190 of 2004 which was brought against it by the 1st Defendant. That the 1st Defendant was forced to withdraw the suit with costs to the Plaintiff. The Plaintiff also stated that the 3rd and 4th Defendant filed Voi PMCC No. 122 of 2014 against it to which it has raised a preliminary objection that is now pending ruling.
  10. The Plaintiff filed its written submissions on 28th May 2015. The Plaintiff submitted that it has established a *prima facie* case with a probability success because it has demonstrated existence of the Agreement for Sale of the suit property by its rightful owners, the 1st Plaintiff. That the Plaintiff has been ready and willing to complete the sale and has informed the Vendors of that fact. That it has even made available to the Vendors Kshs. 300,000/= to facilitate eviction of illegal miners and squatters from the suit property to facilitate completion. That the fact that the Plaintiff paid a deposit of Kshs. 3,500,000/= which was more than one-third of the purchase price, instead of the usual ten per cent of the purchase price confirms the Plaintiff's seriousness to complete the sale.
  11. The Plaintiff submitted further that the 2nd, 3rd and 4th Defendants have not shown any legal rights over the suit property which can entitle them to evict or interfere with the Plaintiff's possession and quiet use of the suit property. That on the other hand, those claiming to represent the estate of the late Oliver Cromwell Mkungusi have previously admitted the existence of the contract for sale of the suit property.
  12. On irreparable loss, the Plaintiff submitted that the subject matter of this suit is land, an expensive

- ranch of which the Plaintiff is already in lawful possession. That the Plaintiff has spent considerable amount of money towards payment of the purchase price and to develop the land to make it suitable for use. That under these circumstances damages cannot be adequate remedy to the Plaintiff and it is next to impossible for the Plaintiff to get similar land for purchase should the court find that damages are adequate remedy.
13. On balance of convenience, the Plaintiff submitted that this case tilts in its favour because it has been in occupation of the suit land since September 1996 and has developed the land. That on the other hand, the 2nd, 3rd and 4th Defendants are strangers to the contract of sale of the land. That none of the Vendors has sought to evict the Plaintiff from the suit property. That the Defendants stand to suffer no prejudice if the order of injunction is granted.
14. The 1st, 3rd and 4th Defendants filed their written submissions on 8th May 2015. They submitted that the Plaintiff has not established a *prima facie* case with probability of success because the agreement of sale was not one of sale of the suit property but rather of interest right and shares of the 1st Defendant Company. Further, the 1st, 3rd and 4th Defendants submitted that the sale agreement is void for being uncertain on the completion date. The 1st, 3rd and 4th Defendants also submitted that there was no sale of the suit property as some of the completion documents listed in the agreement for sale and more specifically titles and or logbooks of properties owned by the company were not delivered.
15. The 1st, 3rd and 4th Defendants submitted that the suit is time barred under **section 4 of the Limitation of Actions Act, Cap. 22 Laws of Kenya** as the suit was filed in August 2014, eight years after the agreement was executed on 16th August 1996. On irreparable loss, the 1st, 3rd and 4th Defendants submitted that Plaintiff has not demonstrated that it shall suffer irreparable loss that cannot be compensated by an award of damages since the amount involved is known. They relied on **HCCC NO. 1044 OF 2001: MOSES NGENYE KAHINDO VS. AGRICULTURAL FINANCE CORPORATION** where the High Court stated that:
- “ In short, I accept the submissions by counsel for the respondent that the applicant's loss, if any, can adequately be compensated in damages.”*
16. On balance of convenience, the 1st, 3rd and 4th Defendants submitted that the same tilts in favour of the 1st Defendant, the registered owner of the suit property. That the Plaintiff came to possess the original title of the suit property out of trust and for purposes of obtaining a Visa, which trust the Plaintiff breached by holding onto the title.
17. I have evaluated the pleadings as filed in regard to this application and the submissions rendered in support thereof. From the documents annexed to the pleadings, it seems to me that the Applicant first obtained possession of the suit property by authority of the registered owner. This is evidenced by the pleadings in **Nairobi CMCC no 2190 of 2004** where the 1<sup>st</sup> Defendant sought and obtained an order to stop the Applicant from grazing on the land. It is indicated on the grounds on the face of that application that the Applicant **“has moved over 2000 heads of cattle to graze on the suit property.”** Further in paragraph 13 of the 1<sup>st</sup> Defendant's replying affidavit, Mr Newman deposes that the 1<sup>st</sup> Defendant is claiming payment of grazing cattle from 2003 to date assessed at Kenya shillings Ten Million and Eighty thousand only (Kshs 10,080,000).
18. The dispute is now why the Applicant has retained possession to date. The Applicant deposes that it got into possession as a Purchaser, retaining possession as purchaser. It annexed a copy of a sale agreement to support this averment. While the respondent avers that the property was leased to him although he never honoured the lease by not paying the cost of grazing that was “agreed” at Kshs 35 per cow per month. The Respondents did issue the Applicant with a notice to vacate the ranch dated 27<sup>th</sup> April 2014. The question to be determined in the main suit is whether the Applicant acquired possession as a lessee therefore it should give vacant possession. Or whether he is a purchaser and ought to remain on the land. In my view this establishes a *prima facie* case with a probability of success.
19. Before considering whether I should grant the orders sought herein or not, I have perused the pleadings to verify the status of the order earlier issued in **NBI CMCC no 2190** of 2004 so that this court does not grant a conflicting order. I have noted that there is an order made in NBI CMCC 2190 of 2004 that is annexed to the Applicant's supplementary affidavit. This order was made on 26<sup>th</sup> March 2004 and issued on 6<sup>th</sup> April 2004. In the order, the suit no **NBI CMCC 2190**

**is marked as withdrawn with costs to the defendant.** The subsequent suit filed in **Voi PMCC no 122 of 2014** was struck out. The 1<sup>st</sup> Defendant did not disclose that this suit was withdrawn. This court shall rely on the order follows that this is the only suit pending in court regarding the subject property.

20. In the case of **Giella vs Cassman Brown** it was held that a party seeking temporary injunctive orders needed to prove any of the three principles established in that case i.e. prima facie case, irreparable loss or balance of convenience in whose favour it tilts. In this circumstance, the Applicant is in possession and has been for quite a while since 1996. The balance of convenience thus tilts in his favour. Consequently on the basis that the application meets the two principles of prima facie case and balance of convenience, I will not address the issue of irreparable loss. I find merit in the notice of motion dated 18<sup>th</sup> August 2014 and grant prayers nos. 5 and 6. The costs of the application to abide the outcome of the main suit. In order to secure the interests of the Respondents, the Applicant is hereby directed by this court to file an undertaking as to damages in favour of the Respondent within 30 days of the delivery of this ruling.

**DATED & DELIVERED IN MOMBASA THIS 11<sup>TH</sup> DAY OF MARCH 2016**

**A.OMOLLO**

**JUDGE**